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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is a defendant entitled to summary judgment in an age discrimination action merely because it offers subjective reasons for hiring persons other than plaintiffs, or, where, as here, plaintiffs having proved a prima facie case and presented evidence rebutting defendant's "reasons" for refusing to hire, are not plaintiffs entitled to a plenary trial to prove the pretextual nature of the defense?

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STATEMENT OF THE CASE

Respondents filed suit under the Age Discrimination Employment Act of 1967, as amended for willful and nonwillful violation of the Act. The district court first granted summary judgment in favor of Petitioner on the nonwillful count and later granted summary judgment in behalf of Petitioner on the willful count. The Court of Appeals[1] affirmed as to the

[1] The opinion of the Court of Appeals appears in Petitioner's Appendix A, App. 1a.

nonwillful count[2] and reversed on the willful count.[3] Respondent submitted substantial documentation to the district court resisting the motions for summary judgment. The Court of Appeals reviewed this documentation in detail and the Court's review represents, at the juncture of the proceedings at which the district court made its decision, the most succinct recitation of the facts. The Court of Appeals states verbatim (Petitioner's Appendix, App 6a, *et seq.*):

> A review of the submitted evidentiary materials reveals, in fact, that the plaintiffs can establish a prima facie case at trial. The plaintiffs were within the protected age group (Herman was 58 and Mullaney was 53) when their applications for E/J positions were rejected in March 1978. *See Monroe v. Equal Employment Opportunity Commission,* Nos. 83-1245 et al., slip op. at 13 (7th Cir. May 30, 1984); *Blackwell v. Sun Electric Corp.,* 696 F.2d 1176, 1180 (6th Cir. 1983). NBC, moreover, concedes that the plaintiffs "had minimal qualifications for the E/J editing positions"; and William Carter, NBC's supervisor of film department employees, testified in his deposition that he hoped to find E/J positions for "as many [film] people as possible." In short, Herman and Mullaney were the type of applicants that NBC sought, and they possessed "qualifications similar" to those actually selected. *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1013 (1st Cir. 1979); *Holder v. Old Ben Coal Company,* 618 F.2d 1198, 1202 (7th Cir. 1980) ("plaintiff must show that the employer was seeking applicants of qualifications comparable to plaintiff's").
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> The concept of a prima facie case, however, should not distract us from the real issue—whether age was a determining factor in NBC's March 1978 decisions. *See Monroe v. Equal Employment Opportunity Commission, supra,* at 12; *see also Texas Department of Community*

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[2] The district court's opinion appears in Petitioner's Appendix B, App. 11a. The Court of Appeals' affirmance of summary judgment relative to the nonwillful count is the subject of a cross-petition for certiorari filed by Respondent.

[3] The district court's opinion appears in Petitioner's Appendix C, App. 20a.

Affairs v. Burdine, 450 U.S. 248, 256 (1981) (plaintiff, at all times, retains the burden of persuasion). A prima facie case is not a complete shield against summary judgment. *See Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir. 1983). NBC produced a legitimate, nondiscriminatory reason for the rejections by submitting affidavits stating that qualifications, not age, determined the 1978 selections. *See Burdine, supra,* at 254. Consequently, the issue became (and still is) whether the evidence before the district court could support a jury verdict finding age discrimination. *See Mason v. Continental Illinois National Bank,* 704 F.2d 361, 366 (7th Cir. 1983); *accord Douglas v. Anderson,* 656 F.2d 538, 535 n.7 (9th Cir. 1981). We now turn to that evidence.

Willis Marshall, the NBC executive who made the hiring decision, stated in his affidavit that he selected the "three best applicants for the three E/J editing positions." Similarly, William Carter, the supervisor who advised Marshall on the matter, stated that he believed those chosen "were the three best applicants." Yet in his deposition, Marshall acknowledged that this type of hiring decision involves "subjective evaluation[s]." We understand this phrase to mean that reasonable employers could disagree about who were the best applicants; and, in any event, matters of preference that are not quantifiable were involved in the selection process. It is not wrong, and certainly not per se illegal, for an employer to exercise his business judgment as he sees fit. Yet a description such as "best" is not compelling evidence that the applicants' relative qualifications were such that no employer would have considered age. *See generally Loeb v. Textron, Inc.,* 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

NBC's defense is not particularly strengthened by examining the describable and objective qualifications of the plaintiffs and those hired—Messrs. Stecker, Martin, and Samuelson. The evidence indicates that Herman and Mullaney were the more experienced film editors (19 years

and 15 years, respectively).[4] Herman also had videotape experience, something that none of those hired claimed on their applications. Marshall stated in his affidavit that he valued Stecker's experience as a cameraman, but Herman also had such a background. Marshall further declared that Samuelson "was the fastest editor at WMAQ-TV," but speed does not necessarily translate into quality, and there was no showing that a fast film editor can become a fast videotape editor. Finally, NBC submitted no evidence to denigrate the plaintiffs' talents.

We do not suggest that Herman and Mullaney were the most qualified applicants. We describe the showings on this question only to point out that NBC's position was not overwhelming. Nevertheless, if the plaintiffs had no proof beyond a bare-bones prima facie case, we might hold that the March 1978 allegations should be removed from the case. But the plaintiffs' evidence did not stop at the prima facie line.

In 1976, as the change from film to videotape was in its early stages, William Carter met with Frank Jordan, described by Carter as the person "responsible for personnel during the changeover." Jordan, who was based in Washington, D.C., met with Carter in Chicago, where the two discussed moving people into E/J positions. Jordan asked Carter to prepare a memorandum listing the names of people in film positions, their company seniority, their proposed utilization, and *their dates of birth.* Carter collected the information, prepared the memorandum for Jordan, and gave a copy to Willis Marshall. Carter later added his personal rankings to the memorandum, which was then used by Marshall in making his March 1978 decisions. If age was not a factor in the hiring decisions,

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[4] This is the Court's footnote 3:

In its memorandum below, NBC stated that Martin "had 16 years of editing experience with WMAQ-TV." But the documents produced by NBC indicate that, although Martin had been with NBC for 16 years, he had 12 years of editing experience. This inconsistency is not significant, however, because one of those hired, Stecker, had only 7 years of editing experience.

why did the memorandum requested by a top NBC executive, and used by those immediately responsible for hiring, contain such information? There may, of course, be a nondiscriminatory explanation, but that possibility does not detract from the evidentiary value of the document.

Moreover, the plaintiffs submitted an affidavit of Richard Ortner, which states that in a job interview with WMAQ-TV's General Manager in 1974, he was told, "Being 50 years old is an absolute no, no for being hired on staff." The General Manager, to be sure, left the Chicago station in 1976, but the transfer to videotape was already in progress. And, although NBC discounts the Ortner affidavit, past discriminatory acts of an employer are evidence of a "custom" or "policy" of discrimination. *See Morris v. Washington Metropolitan Area Transit Authority,* 702 F.2d 1037, 1045 (D.C. Cir. 1983).

Finally, the plaintiffs have statistical support for their case. The usefulness of statistical evidence depends on the circumstances of the case, *compare Reeves v. General Foods Corp.,* 682 F.2d 515, 525 (5th Cir. 1982), *with Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981), and we will not assess the force of the instant data.[5] We will note that the 20 persons hired pursuant to the 1976, 1977, and 1978 job postings were all under 50 years old. To rebut the plaintiffs' view of the statistics, at oral argument NBC directed our attention to a document indicating that 16 film employees under 50 years old were not retained in the transition. That same document, however, shows that 33 persons *under* 50 were hired in new jobs, whereas all 11 employees *over* 50 were dismissed.

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[5] This is the Court's footnote 4:

The plaintiffs assert that an expert will testify that the statistics establish that age did play a role in NBC's hiring decisions. However, no affidavit to that effect was filed, *see* Fed. R. Civ. P. 56(e), and thus the district court properly ignored the assertion.

> In conclusion, we disagree with the district court's statement that "plaintiffs . . . have offered no proof which casts doubt on the veracity of NBC's [proffered] reasons for making its hiring decisions." The district court may have believed that the plaintiffs needed direct evidence of discriminatory intent (such as an admission), but that plainly is not the law, *see United States Postal Service Board of Governors v. Aikens,* 103 S. Ct. 1478, 1481 n.3 (1983). As the Supreme Court declared in *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 472 (1962), "we cannot say on this record that 'it is quite clear what the truth is.' "

REASONS FOR NOT GRANTING THE WRIT

Petitioner has presented nothing new or compelling. Simply stated, the district court was wrong in granting summary judgment and the Court of Appeals reversed. There was no deviation from *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The Court of Appeals, in an elaborate recitation of the potential facts already presented in support of and in opposition to summary judgment, merely held that based on Respondents' showing, they should not be denied a plenary trial to attack the veracity of Petitioner's proffered reasons for the refusals to hire, *i.e.,* to show that the reasons were pretextual.

Petitioner is not candid with this Court when it claims that the Court of Appeals held that "an employer must show that 'the applicants' relative qualifications were such that *no* employer would have considered age' " (Petition, pg. 10). (Italics are those of Petitioner). How terrible and insulting it is to quote out of context to any court, let alone this Court. The actual and total quotation of the Court of Appeals is as follows:

> Willis Marshall, the NBC executive who made the hiring decision, stated in his affidavit that he selected the

> "three best applicants for the three E/J editing positions." Similarly, William Carter, the supervisor who advised Marshall on the matter, stated that he believed those chosen "were the three best applicants." Yet in his deposition, Marshall acknowledged that this type of hiring decision involves "subjective evaluation[s]." We understand this phrase to mean that reasonable employers could disagree about who were the best applicants; and, in any event, matters of preference that are not quantifiable were involved in the selection process. It is not wrong, and certainly not per se illegal, for an employer to exercise his business judgment as he sees fit. Yet a description such as "best" is not compelling evidence that the applicants' relative qualifications were such that no employer would have considered age. (Petitioner's Appendix, App. 7a-8a).[6]

As can be seen, all the Court of Appeals said was that an employer might have considered age and that the characterization of selecting someone because he was "best" on the basis of a subjective evaluation was not enough in the light of the proferred proof of the plaintiffs to grant Petitioner's motion for summary judgment. What Petitioner is saying is that all it, or any defendant, has to do, is respond in a parrot like fashion that

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[6] Petitioner has done it again. In the Court of Appeals, Petitioner's counsel included a deleted line from the Seventh Circuit's decision in *Holder v. Old Ben Coal Company*, 618 F.2d 1198, 1202 (C.A. 7, 1980) which the Seventh Circuit had removed when the petition for rehearing was denied. The inclusion of the line changed the import of the *Holder* decision and the deleted line was used by Petitioner to argue to the Court of Appeals that "plaintiffs cannot meet the threshold requirements of a prima facie case of age discrimination" (Petitioner's Appendix, 6a). The Court of Appeals stated "NBC has, however, misquoted *Holder*." (Petitioner's Appendix, 6a). The Court added, "Thus four years after the opinion was modified and correctly published in the *Federal Reporter*, NBC continues to cite and rely on a deleted sentence. We, of course, do not suggest that NBC's attorneys have intentionally misrepresented *Holder*, but lawyerlike steps to ensure accuracy plainly were not taken." (Petitioner's Appendix, 6a).

someone was the "best" and that this should foreclose further inquiry. How convenient, how erroneous and how frivolous. If every defendant could say that it was not guilty and then simply walk away, what a wonderful life it would be for defendants who had violated the law. Indeed, here, the Seventh Circuit even went on to state, "We do not suggest that Herman and Mullaney were the most qualified applicants. We describe the showings on this question only to point out that NBC's position was not overwhelming. Nevertheless, if the plaintiffs had no proof beyond a bare-bones prima facie case, we might hold that the March 1978 allegations should be removed from the case. But the plaintiffs' evidence did not stop at the prima facie line." (Petitioner's Appendix, App. 8a).

Respondents are entitled to have a jury hear their evidence and make the determination as to whether Respondents can prove that Petitioner's proffered defense is pretextual. This is the law. This has been the law and the Court of Appeals did not alter it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Because of the frivolity of Petitioner's petition, Respondents request that they be awarded their attorneys' fees.

Respectfully submitted,

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